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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935.

No. 193

ELINOR DORRANCE HILL,

Appellant,

vs.

J. H. THAYER MARTIN, STATE TAX COMMISSIONER OF THE STATE OF NEW JERSEY, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY.

STATEMENT AS TO JURISDICTION AND MOTION TO ADVANCE.

WM. A. SCHNADER,
Counsel for Appellant.

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IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE DISTRICT OF NEW JERSEY

In Equity.

No. 5092

ELINOR DORRANCE HILL,

Plaintiff,

vs.

J. H. THAYER MARTIN, STATE TAX COMMISSIONER OF THE STATE OF NEW JERSEY; WILLIAM D. KELLY, STATE SUPERVISOR, INHERITANCE TAX BUREAU, OF THE STATE OF NEW JERSEY; FRANK J. MURRAY, COMPTROLLER OF THE STATE OF NEW JERSEY; WILLIAM H. ALBRIGHT, STATE TREASURER OF THE STATE OF NEW JERSEY; AND DAVID T. WILENTZ, ATTORNEY GENERAL OF THE STATE OF NEW JERSEY,

Defendants.

STATEMENT AS TO JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES.

(a)

Jurisdiction is based upon Section 266 of the Judicial Code, which provides:

> "An appeal may be taken direct to the Supreme Court of the United States from the order granting or

denying, after notice and hearing, an interlocutory injunction in such case."

(b)

The New Jersey statute, the validity of which is involved on this appeal is the Inheritance Tax Act of April 20, 1909, Laws of 1909, Ch. 228, p. 325.

The provisions of the statute pertinent to this appeal are summarized as follows:

Section 1 imposes a graduated tax, *inter alia*, upon the transfer of any property, real or personal, exceeding $500.00 in value, when the transfer is by will from any person dying, seized or possessed of the property while a resident of the State.

The same section provides that all administrators, executors, trustees, grantees, donees or vendees shall be personally liable for any and all such taxes until they are paid, and that for their collection an action of debt shall lie in the name of the State of New Jersey.

Section 5 provides that the taxes imposed by the act shall be due and payable at the death of the testator and if not paid within one year thereafter shall bear interest at the rate of 10 per centum per annum from the expiration of the year. And that in all cases where the executors do not pay the tax within one year from the date of death they shall be required to give a bond to the State of New Jersey in double the amount of the tax conditioned to pay the tax with interest.

The same section provides that all taxes levied and assessed under the act shall be and remain a lien on all property owned by the decedent as of the date of death until paid or secured by bond.

Section 18 authorizes the State Tax Commissioner to appoint appraisers and take testimony to fix the value of

property subject to taxation under the act. It is the duty of the State Tax Commissioner to "assess and fix the cash value of such estate and levy the tax to which the same is liable," and to give notice by mail to all parties in interest.

The section provides that, "Any person or corporation dissatisfied with said appraisement or assessment may appeal therefrom to the Ordinary of this State within sixty days after the making and filing of such assessment, on giving a bond, approved by the Ordinary of this State, conditioned to pay said tax so as aforesaid levied by the said State Tax Commissioner, together with interest and costs, if the said tax be affirmed by the Ordinary."

Section 20 grants to the Ordinary jurisdiction "to hear and determine all questions in relation to any tax levied under the provisions of this act."

Section 21 provides that if it shall appear to the State Tax Commissioner that any tax which has accrued under the act has not been paid according to law, he shall report that fact in writing to the register of the Prerogative Court who shall issue a citation citing the persons or corporations interested in the property liable to the tax to appear before the Ordinary on a certain day, not more than three months from the date of such citation, and show cause why such tax should not be paid. The service of the citation and the subsequent proceedings shall conform to the practice prevailing in the Prerogative Court. Upon the making of any decree the register of the Prerogative Court is required, upon the request of the State Tax Commissioner, to furnish one or more copies of the decree, "and the same shall be docketed and filed by the clerk of the Supreme Court, or by the county clerk of any county in this State, upon the request of the State Tax Commissioner, and the same shall have the same ef-

fect as a lien by judgment, and execution shall issue thereon according to the rules and practice appertaining to other judgments docketed and filed with said respective clerks."

(c)

The decree sought to be reviewed was entered on June 4, 1935; and the application for appeal was presented on the same day.

The Nature of the Case.

The plaintiff, a daughter and residuary legatee of John T. Dorrance, deceased, seeks an injunction against the State Tax Commissioner and other officers of the State of New Jersey to restrain them from enforcing the New Jersey Inheritance Tax act by collecting transfer inheritance tax on the intangible personal property belonging to said decedent's estate.

The tax claimed by the defendants amounts, with interest, to more than $16,000,000.

This estate has already paid inheritance tax on the same property to the Commonwealth of Pennsylvania, amounting to more than $14,500,000. See 287 U. S. 660; 288 U. S. 617.

The plaintiff brings this action independently of the executors of the will of John T. Dorrance because (a) after the Supreme Court of Pennsylvania held that Dr. Dorrance was domiciled in Pennsylvania at the time of his death, the executors filed a petition with the Surrogate of Burlington County, New Jersey, asking that the probate of the will in New Jersey be revoked, and (b) thereafter the New Jersey State Tax Commissioner filed a petition in the Orphans Court of Burlington County, asking

that the executors be removed for breach of duty in resisting the payment of the New Jersey inheritance tax, and the appointment of the State Treasurer of New Jersey as substituted executor. Both of these petitions are pending and undisposed of.

The executors' petition seeking revocation of probate was filed on April 23, 1933. The executors' appeal to the Supreme Court of New Jersey (hereafter recited) was taken subsequent to May 11, 1934, when the Ordinary rendered his decision. Thus the executors had denied their authority to act under their existing letters testamentary, prior to their appeal to the Supreme Court of New Jersey.

The plaintiff asserts:

1. That inheritance taxes can be collected upon the transfer from a decedent of intangible personal property only by the State in which the decedent was domiciled at the date of his death, and that any attempted collection thereof by any other State is an attempt to take property without due process of law, contrary to the 14th Amendment to the Constitution of the United States. *The Farmers Loan & Trust Co.* v. *Minnesota,* 280 U. S. 204 (1930); *Baldwin* v. *Missouri,* 281 U. S. 586 (1930); *Beidler* v. *South Carolina Tax Commission,* 281 U. S. 1 (1930); *First National Bank of Boston* v. *Maine,* 284 U. S. 312 (1932).

2. That prior to his death Dr. John T. Dorrance had established his dwelling place and family home in Pennsylvania without any present intention of not residing there indefinitely, and that accordingly he was domiciled in Pennsylvania at the time of his death. *Williamson* v. *Osenton,* 232 U. S. 619 (1914); *Gilbert* v. *David,* 235 U. S. 561 (1915); Sections 15, 16, 18, 19, 20 Restatement of the Law of Conflict of Laws.

3. That the New Jersey Inheritance Tax Act is unconstitutional under the 14th Amendment if it authorizes the defendants to collect transfer inheritance tax upon the transfer of intangible personal property of a decedent who prior to his death had established a dwelling place and family home in another State without any present intention of not residing there indefinitely.

4. That if the New Jersey Inheritance Tax Act be construed as not applying to property of a decedent under the circumstances heretofore stated, then the threatened collection by the defendants of such tax from the decedent's estate, unconstitutionally deprives the plaintiff of her property without due process of law.

5. That this case parallels *City Bank Farmers Trust Co.* v. *Schnader, et al.*, 291 U. S. 24 (1934), except in two respects, as follows:

(a) That case challenged as unconstitutional a Pennsylvania act otherwise constitutional, if construed as taxing *tangible* personal property alleged to have its situs outside of Pennsylvania. This case challenges as unconstitutional a New Jersey act otherwise constitutional if construed as taxing *intangible* personal property alleged to have its situs outside of New Jersey.

(b) The point at which the action in the Federal court was brought. We shall discuss this difference more fully under the next heading.

The Action of the 3-Judge Court.

This court based its refusal to grant the preliminary injunction solely on the ground that the action here was brought too late. It disclaims jurisdiction under Section 265 of the Judicial Code.

We shall summarize the factual and statutory situation upon which the decision depends.

As already indicated, the New Jersey Inheritance Tax Act authorizes an appeal from the assessment, made by the State Tax Commissioner, to the Ordinary sitting in the Prerogative Court.

We contend that in reviewing tax assessments the Ordinary's function is administrative and not judicial.

The Constitution and statutes of New Jersey permit dissatisfied parties to apply to the Supreme Court of New Jersey for a writ of certiorari to review the action of the Ordinary on tax assessments.

From the decision of the Supreme Court of New Jersey, an appeal may be taken to the Court of Errors and Appeals, which is the State court of last resort.

The executors of Dr. Dorrance appealed to the Ordinary and subsequently carried the matter to the Supreme Court of New Jersey by writ of certiorari.

The Supreme Court of New Jersey affirmed the Tax Commissioner's assessment on February 11, 1935. The executors may take an appeal to the Court of Errors and Appeals at any time prior to February 11, 1936. They have signified their intention of taking such appeal unless the present action renders it unnecessary.

The plaintiff asserts that the review of tax assessments by the Supreme Court of New Jersey is administrative, rather than judicial. She concedes that the ultimate review by the Court of Errors and Appeals is judicial and not administrative.

Under the New Jersey procedure the taxpayers are prosecutors and the State Tax Commissioner is respondent in proceedings testing the correctness of inheritance tax assessments. Accordingly in the New Jersey proceedings up to and including those in the Supreme Court of New Jersey

the executors of Dr. Dorrance were prosecutors, and the State Tax Commissioner was respondent.

The plaintiff was not a party in any of the State court proceedings.

It is conceded by the defendants—as it must be—that under the law of New Jersey, inheritance tax cannot be collected in proceedings before the Ordinary and in the Supreme Court of New Jersey such as those which we have described. An independent action must be brought to collect the tax. Such action would be either an action of debt, under Section 1 of the Inheritance Tax Act, or a statutory proceeding under Section 21.

If the administrative procedure in New Jersey was concluded Dr. Dorrance's executors are free to seek an injunction in the Federal courts. *Bacon* v. *Rutland R. R. Co.*, 232 U. S. 134 (1914). Thus, if the plaintiff has no higher rights than the executors, she may seek such injunction. If she has an independent right of action, the proceedings heretofore had in New Jersey, are immaterial.

Plaintiff contends that even if the executors have taken one step in resisting the payment of the tax through the State's judicial procedure, and she stands in their position, she may nevertheless maintain this action because:

1. The pendency of a prior suit in a state court is not a bar to a suit in the United States courts by the same plaintiff against the same defendant for the same cause of action. *Stanton* v. *Embrey*, 93 U. S. 548 (1876); *Willcox* v. *Consolidated Gas Co.*, 212 U. S. 19 (1909); *Home Telephone & Telegraph Co.* v. *Los Angeles*, 227 U. S. 218 (1913); *Grubb* v. *Public Utilities Commission*, 281 U. S. 470 (1930); *McClellan* v. *Carland*, 217 U. S. 268 (1910).

2. Only a final State court judgment—that is a judgment of the court of last resort of a State, or a lower court judgment in which the parties have acquiesced—can effectively

be pleaded as *res judicata* in a Federal court. *Grubb* v. *Public Utilities Commission,* 281 U. S. 470, 475 (1930); *American Surety Company* v. *Baldwin,* 287 U. S. 156, 164 (1932); *Eastern Building & Loan Ass'n. of Syracuse* v. *Welling,* 103 Fed. 352, 355 (1900); *Tampa Waterworks Co.* v. *City of Tampa,* 124 Fed. 932, 936 (1903); *McWilliams* v. *Hopkins,* 11 F. (2d) 793, 796 (1926); *Belts* v. *Railroad Commission of California,* 6 F. Supp. 591, 592 (1933).

3. In this case, the executors have not acquiesced in the decision of the Supreme Court of New Jersey—an intermediate court of appeal. They have declared their intention of taking an appeal to the highest court of the State within the time allowed by law, unless this action renders that appeal unnecessary.

Finally, this action is not barred by Section 265 of the Judicial Code. Plaintiff is not seeking an injunction to stay proceedings in a State court because:

1. The only proceedings thus far instituted were instituted by the executors of Dr. Dorrance. The proceedings are concluded unless and until the executors take an appeal to the Court of Errors and Appeals.

2. An independent action must be instituted to collect the tax from the estate. No such action has been instituted, and therefore an injunction presently issued would not "stay" any proceedings by the defendants in the New Jersey State courts. As yet there are no proceedings to collect the tax which could be stayed.

3. Proceedings such as those heretofore had in the New Jersey courts do not eventuate in a judgment against the taxpayers for the tax. They eventuate only in an affirmance, disaffirmance or modification of an assessment. The fact that another proceeding is vital to a collection of the tax, does not draw such proceeding within the prohibition

of section 265 of the Judicial Code. *Mississippi R. R. Com.* v. *Illinois Central R. R. Co.*, 203 U. S. 335 (1906).

WM. A. SCHNADER,
Solicitor for and of Counsel with Plaintiff.

1719 Packard Building, Philadelphia, Pa.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935.

No. 193

ELINOR DORRANCE HILL,

Appellant,

v.

J. H. THAYER MARTIN, STATE TAX COMMISSIONER OF THE STATE OF NEW JERSEY; WILLIAM D. KELLY, STATE SUPERVISOR, INHERITANCE TAX BUREAU, OF THE STATE OF NEW JERSEY; FRANK J. MURRAY, COMPTROLLER OF THE STATE OF NEW JERSEY; WILLIAM H. ALBRIGHT, STATE TREASURER OF THE STATE OF NEW JERSEY; AND DAVID T. WILENTZ, ATTORNEY GENERAL OF THE STATE OF NEW JERSEY,

Appellees.

MOTION TO ADVANCE.

To the Honorable, the Chief Justice and Justices of the Supreme Court of the United States:

Your petitioner, the appellant in the above case, moves that the argument therein be advanced, and in support of her motion respectfully represents:

1. That this case involves the question whether a three-judge court convened under Section 266 of the Judicial Code, in the District Court of the United States for the Dis-

trict of New Jersey, has jurisdiction to issue an injunction against the tax collecting officers of the State of New Jersey, restraining them from collecting a transfer inheritance tax on the intangible personal property of the estate of Dr. John T. Dorrance, deceased;

2. That said Dr. John T. Dorrance died on September 20, 1930; that the executors named in his will qualified promptly; but that his estate cannot be settled as yet, because of litigation, first in the courts of Pennsylvania, and then in the courts of New Jersey, involving the taxability by the said States, respectively, of the intangible personal property belonging to said estate;

3. That said estate was forced to pay to Pennsylvania inheritance tax on said intangible personal property in the amount of $14,500,000, and to post a bond in the amount of $4,000,000 for the payment of additional tax to said State, the precise amount of which has not yet been determined;

4. That the Appellee State Tax Commissioner of the State of New Jersey on October 10, 1932, assessed a transfer inheritance tax on the same intangible personal property in the amount of $12,247,333.52, and claims interest thereon at the rate of ten per centum per annum from September 20, 1931, to the date of payment of said tax;

5. That on December 9, 1932, the executors of the will of said Dr. John T. Dorrance appealed from said assessment to the Ordinary of the State of New Jersey who on May 11, 1934, affirmed the assessment; thereafter said executors filed their petition with the Supreme Court of New Jersey for a writ of certiorari to bring up said assessment for review; and on February 11, 1935, said Supreme Court affirmed said assessment.

6. That your petitioner is advised and therefore avers that she is entitled to injunctive relief in the District Court

of the United States against the collection, from the said estate, of the tax claimed by New Jersey; but the court below has ruled that it is without jurisdiction to grant such relief;

7. That if the decision of the court below be affirmed, the executors of said estate will be compelled to engage in further litigation in the courts of New Jersey to contest the aforesaid assessment of tax and thereafter to contest its collection, and will in due course file their petition for certiorari in this court, all of which will consume many months and possibly a number of years;

8. That if the decision of the court below be reversed, it will be necessary for the court below to proceed to a hearing on the merits, and there will undoubtedly be an appeal to this court by the losing party from the decision of the court below, so that a final decision in the case cannot be had for some months after this court determines the present appeal;

9. That said estate is being seriously prejudiced by the inability of the executors to settle it; and should it be determined that New Jersey is entitled to the tax in question, said estate may be compelled to pay interest at the rate of approximately one hundred thousand dollars ($100,000) per month for delay in the payment of said tax;

10. That on February 11, 1936, the time will expire within which the executors of the will of Dr. Dorrance may appeal from the decision of the Supreme Court of New Jersey to the New Jersey Court of Errors and Appeals; and the decision of your Honorable Court in this case will be determinative of the question whether such an appeal should be taken;

11. That because of the foregoing facts, it is urgently important to said estate, that the present appeal be argued and determined at the earliest date possible;

12. That this appeal involves substantially the same questions as, and can conveniently be heard with, the appeal in Ethel M. Dorrance, et al., appellants v. the same appellees, October Term, 1935, No. 194.

WHEREFORE, your petitioner respectfully moves that the argument herein be advanced.

W. A. SCHNADER,
Attorney for Appellant.

(6609-C)